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No. 179

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

CECIL L. COURTNEY, PHILLIP T. FERRIS,
AND RAY PARKS,
PETITIONERS,

vs.

TY LOCKETT,
RESPONDENT.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas.

REPLY BRIEF OF PETITIONERS.

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STATEMENT.

Petitioners deem it necessary to file a brief in reply to the brief of Respondent in opposition to the petition for writ of certiorari, for the purpose of correcting certain erroneous statements contained in the brief of the respondent.

ARGUMENT.

Respondent states in his brief in opposition, at p. 3:

> "Petitioners now contend that the secrecy of the inquisition proceeding, including their commitments for contempt violated their rights under the Federal Constitution (Petition, p. 4). They rely on the case of *Re William Oliver*, 333 U. S. 257, to support their contention (Petition, p. 4). But before the Supreme Court of Kansas, petitioners' sole objection to the secrecy of the entire proceeding was based upon petitioners' construction of the inquisition statute (R. 2, 4-5, 7-8). The Oliver case was never cited by petitioners in the four briefs which they filed below, including their brief in support of a motion for rehearing; *and the Oliver Case was never considered by the Court below* (R. 172-193). *The secrecy question, as a constitutional problem, made its first appearance in this proceeding when the petition for writ of certiorari was filed by petitioners.*" (Emphasis supplied.)

In reply to this contention of respondent, this Court's attention is directed to the opinion of the court below (R. 185), wherein it is said:

> "Petitioners argue the sentences and commitments for direct contempt are invalid in that they violate *constitutional* and statutory provisions. Briefly stated, petitioners assert they were accused of contempt, tried, convicted, sentenced and committed without formal charges first having been preferred against them, and without evidence or counsel." (Emphasis supplied.)

In petitioners' first brief filed in the original proceedings in the Supreme Court of Kansas it was said, at p. 28:

"It may be argued that petitioners were subpoenaed as witnesses and did not appear as accused. However, this contention may be easily met by an examination of the statute (G. S. 1949, 62-301) under which the petitioners were adjudged in contempt, which recites in part: 'A judge . . . may fine, or imprison any person for contempt on account of his refusal . . . to answer questions as a witness . . .'

"The above quoted portion of the statute clearly places any person subpoenaed to testify as a witness in an inquisition proceeding in the position of an accused, *upon his refusal to testify.* The proceedings which resulted in the confinement of the petitioners were not only conducted in secret but petitioners were denied counsel *after* they had refused to testify and *before* sentence was passed. They were not permitted to ascertain their rights and privileges from counsel of their own choice when they stood before the Court accused of contempt, behind locked doors and in the presence of officers of the court whose interests, in the minds of the petitioners, were inimically opposed to theirs.

"Nothing can be found in G. S. 1949, 62-301, which limits, or is in derogation of the petitioners' constitutional guaranties of a public trial. Proceedings *in camera,* except in special instances provided by statute, are repugnant to the fundamental principles of English and American law. . . . " (Italics appeared in the original printed brief.)

The above, of course, does not appear in the record before this Court. However, petitioners are confident that respondent will not deny (in the face of concrete proof afforded by the original printed brief and his acknowledgment of receipt thereof) the accuracy of the quoted material.

It is quite true that petitioners did not cite *Re William Oliver,* supra, in support of the argument quoted from their brief before the Court below, for the reason that the case had not been discovered in petitioners' research. It must be admitted, nevertheless, that petitioners' argument was certainly in point with this Court's opinion in that case.

Respondent states in his brief " . . . the *Oliver* case was never considered by the Court below" (p. 3). It may well be that the Supreme Court of Kansas did not consider the cited case. However, the statement by respondent is tantamount to an accusation that the Supreme Court of Kansas was derelict in its duty, as the brief of the Attorney General of Kansas, as Amicus Curiae, makes abundant reference to the *Oliver* case. Nearly three full pages (pp. 58, 59, and 60) of the Attorney General's brief is devoted to a comprehensive, although erroneous, discussion of the Oliver case and its significance and relation to the instant case. The discussion begins at p. 58, and states

> "No discussion of this problem could be complete without some reference to *In re Oliver,* 333 U. S. 257, decided by the Supreme Court of the United States in 1948. Reference to the facts involved indicate the basis for the Court's decision."

Again, the briefs filed in the Court below do not constitute a part of the record before this Court; but petitioners are forced to go beyond that record by the misleading and erroneous statements of respondent in his brief in opposition to the petition. Petitioners cannot

assert with certainty that counsel for respondent who prepared the brief in opposition were ever served with the brief amicus curiae. However, it should be noted that the Attorney General of Kansas now appears as counsel for respondent, and it was under his direction, presumably, that the brief citing the *Oliver* case was prepared. The attention of the Supreme Court of Kansas was also directed to the *Oliver* case in oral argument by Mr. Paul Kitch, of counsel for the respondent, who attempted to distinguish it from the instant case. Mr. Kitch's name appears on page 9 of the Brief for Respondent in Opposition.

Respondent makes much of the fact that the Supreme Court of Kansas failed to refer to the *Oliver* case in either its majority or dissenting opinions. The only significance that can be attached to that fact is that it is impossible to reconcile the *Oliver* decision with the majority opinion of the Supreme Court of Kansas in the instant case. Petitioners certainly cannot be held responsible for the failure of the Court below to cite a case which is controlling, and directly antithetical to that Court's opinion; nor can petitioners be charged with the omission from the majority opinion of the Supreme Court of Kansas of any reference to petitioners' arguments which would tend to vitiate its decision.

CONCLUSION.

It is submitted that the federal questions sought to be reviewed herein were properly raised and fully presented in the Supreme Court of Kansas, by the pleadings, briefs, and upon oral argument.

It is further respectfully requested that a writ of certiorari issue to the Supreme Court of Kansas, to the end that the decision of said court may be reviewed by this Court and the errors contained in said decision be corrected.

Dated September 30, 1954.

PAYNE H. RATNER,
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444 North Market,
Wichita, Kansas.

Service on counsel for respondent of a copy of above reply brief is hereby acknowledged this ..... day of ....., 1954.

..... Attorney for Respondent.

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